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NOTES.

COVENANTS RUNNING WITH THE LAND.—A covenant running with the land creates personal rights and obligations in those not parties to the contract, and it is, therefore, not surprising that the courts have differed in their interpretation of these agreements. It was resolved in *Spencer's Case*[1] that such covenants must touch and concern the land, but this statement of the law was too vague to lay down any final test, with the result that the courts, in explaining and qualifying this resolution, have enunciated numerous conflicting rules.[2] The modern conception of a covenant touching and concerning the land

[1](1583) 5 Co. 16a.

[2]See Bally *v.* Wells (1769) 3 Wilson 25; Vernon *v.* Smith (1821) 5 B. & Ald. 1; Norman *v.* Wells (N. Y. 1837) 17 Wend. 136; Keppel *v.* Bailey (1834) 2 M. & K. 517.

appears to be that it is one which affects the value of the land,[3] and it would follow that the covenant must affect the owner of the estate by virtue of his ownership.[4] In some jurisdictions, effects in their nature indirect sustain the running of a covenant, so that agreements increasing the profits of the land for collateral reasons have been held to touch and concern the land.[5] Nevertheless, the weight of authority requires that some direct advantage or disadvantage enure to the estate independent of collateral circumstances,[6] or that the influence of the covenant on the value of the estate be clearly evident from the face of the grant or demise.[7] The narrower limitation was applied in the recent case of *Consolidated Arizona Smelting Co.* v. *Hinchman* (C. C. A. 1914) 212 Fed. 803, in which a covenant to pay to the vendor of certain mining property, and his assigns, a given percentage of the net earnings of such property, up to a specified sum, was held to be merely personal.

It may, therefore, be stated that no covenant will run unless it touches and concerns the land in accordance with the test laid down in the particular jurisdiction, and that the stipulations of the parties to the covenant cannot cause the agreement to affect third parties if it does not in its nature touch and concern the land.[8] The fact that a covenant does touch and concern the land is not, however, the only factor in determining whether it will run with the land. Another feature is that there be some sort of privity, either of contract or of estate, between the parties to the suit.[9] Privity of estate originally denoted some form of tenure between the parties, and since the Statute *Quia Emptores* abolished subinfeudation, a grantee in fee bears no relation to the grantor of his grantor, so that privity in the orthodox sense would seem to be limited to the relation of landlord and tenant.[10] A covenant which touches and concerns the land may, by the rules of the common law as supplemented by the Statute of 32 Henry VIII,

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[3]Gilmer *v.* Mobile etc. Ry. (1885) 79 Ala. 569, affd. (1888) 85 Ala. 422; Norman *v.* Wells, *supra;* Shaber *v.* St. Paul Water Co. (1883) 30 Minn. 179. The act contemplated need not be performed upon the land itself, as long as it influences the value of the land. Norfleet *v.* Cromwell (1870) 70 N. C. 634; Vyvyan *v.* Arthur (1823) 1 B. & C. 410.

[4]Vyvyan *v.* Arthur, *supra;* Vernon *v.* Smith, *supra;* see National Union Bank at Dover *v.* Segur (1877) 39 N. J. L. 173.

[5]Vyvyan *v.* Arthur, *supra;* National Union Bank at Dover *v.* Segur, *supra.*

[6]Congleton *v.* Pattison (1808) 10 East 130; Wiggins Ferry Co. *v.* Ohio etc. Ry. (1879) 93 Ill. 83; Norcross *v.* James (1885) 140 Mass. 188; Brewer *v.* Marshall (1867) 18 N. J. Eq. 337. A covenant which relates only to the mode of occupying the land will not run with the land. Thomas *v.* Hayward (1869) L. R. 4 Ex. 311.

[7]*Cf.* Norman *v.* Wells, *supra,* p. 157.

[8]Gibson *v.* Holden (1885) 115 Ill. 199; Wilmurt *v.* McGrane (N. Y. 1897) 16 App. Div. 412. The parties may, however, contract that a covenant which would otherwise run with the land, shall not affect third parties. See Wilmurt *v.* McGrane, *supra;* Masury *v.* Southworth (1859) 9 Ohio St. 340.

[9]See Webb *v.* Russell (1789) 3 T. R. 393; 2 Bac. Abr. (Am. ed.) 572. There appears to be some confusion between the necessity of privity and the requirement that a covenant touch and concern the land. See Bally *v.* Wells, *supra,* which draws a clear distinction.

[10]See Keppel *v.* Bailey, *supra;* 11 Columbia Law Rev. 384.

c. 34,[11] run against the assignee of the lessee or the assignee of the reversion, or in favor of these parties,[12] since the lessee takes only a temporary possession of an estate which will ultimately revert to his lessor,[13] and the required privity of estate is, therefore, present.

A covenant running on a grant in fee must, however, be explained on other principles, except in the limited class of cases where the grantor reserves an interest which may create some fiction of tenure construed not to have been abolished by the Statute *Quia Emptores*.[14] Where the grantee takes an estate subject to the benefit of a covenant, an assignment of a chose in action may be implied in the transfer of the estate.[15] Since a chose in action is to-day everywhere assignable, there should accordingly be no difficulty in deciding that the benefit of a covenant may run with a grant in fee, and this is the general rule.[16] Since, however, there can be no assignment of an obligation in the absence of some facts tending to show a novation, a grantee should take the estate free of all covenants which put a burden upon the estate granted. This is the view now adopted in England, both at law[17] and in equity, since Chancery will not enforce an agreement against a party not privy thereto which does not amount to a covenant running with the land at law,[18] unless it comes within the peculiar equitable notion of a restrictive agreement as set forth in *Tulk* v. *Moxhay*.[19]

In this country, the doctrine that a burden would not run with the land at law was at first rigidly followed,[20] but certain jurisdictions have somewhat qualified the theory, while others have rejected it altogether. This may be said to have resulted from a change in the conception of the nature of privity of estate, a term which is no longer limited to tenurial relations, but has frequently been said to exist whenever the covenant so touches and concerns the land or estate of both parties, that there is a mutual or successive relationship as to the same rights of property.[21] Under this definition the covenant cannot be separately created, but must always accompany a grant or transfer of the interest to which it is appurtenant,[22] since the estate itself is

[11]This statute gave a cause of action to the reversioner, and has been re-enacted in most of our States. See Sims, Real Covenants, 73 *et seq.* For the common law, see 2 Gray, Cases on Property (2nd ed.) 318.

[12]Vernon *v.* Smith, *supra;* Norman *v.* Wells, *supra;* see Bac. Abr. (Am. ed.) 566 *et seq.*

[13]See Keppel *v.* Bailey, *supra.*

[14]Van Rensselaer *v.* Smith (N. Y. 1858) 27 Barb. 104, affd. *sub. nom.* Van Rensselaer *v.* Hayes (1859) 19 N. Y. 58. The case may be explained equally as well as a covenant necessary to the enjoyment of an incorporeal hereditament.

[15]See Masury *v.* Southworth, *supra.*

[16]Pakenham's Case (1368) Y. B. 42 Edw. III, 3; National Union Bank *v.* Segur, *supra.*

[17]See Austerberry *v.* Oldham (1885) L. T. 29 Ch. Div. 750.

[18]Austerberry *v.* Oldham, *supra.*

[19](1848) 2 Phil. 774. For a discussion of the so-called equitable easement, see 12 Columbia Law Rev. 158.

[20]Plymouth *v.* Carver (Mass. 1834) 16 Pick. 183; Cole *v.* Hughes (1873) 54 N. Y. 444.

[21]See Mygatt *v.* Coe (1891), 124 N. Y. 212, 220; Kelly *v.* Nypano R. R. (1898) 23 Pa. Co. Ct. 177; Bally *v.* Wells, *supra.*

[22]Railroad *v.* Webster (1900) 106 Tenn. 586; Fresno etc. Co. *v.* Rowell (1889) 80 Cal. 114; but see Bronson *v.* Coffin (1871) 108 Mass. 175, 180.

the medium which creates the required privity.[23] Where the term privity has been thus construed, there would appear to be no reason why all burdensome covenants which touch and concern the land should not bind grantees in fee. It is submitted, however, that a fundamental objection to a burdensome covenant is that it binds the land in perpetuity and tends to restrict its alienation at the caprice of some remote grantor,[24] and the courts should, therefore, follow the example of Chancery and exercise their discretion in enforcing agreements absolute in their effects, so that such burdens only will be upheld as can be imposed consistently with policy and principle.[25]

Certain jurisdictions which have not altogether rejected the orthodox conception of privity, have nevertheless permitted the burden of a covenant to run at law where it tends to support an easement. This relation, known as "substituted privity", exists where some subordinate interest is granted or retained by the grantor, and the covenant is necessary to the substantial enjoyment of the subordinate interest.[26] In certain other instances the burden and benefit are so inseparably connected that the grantee must take the benefit subject to the burden.[27] The principle of "substituted privity" has sometimes, however, been extended to cases in which the covenant touched and concerned the subordinate interest, but was neither necessary to nor bound up in the complete enjoyment thereof, as in the recent case of *Parrott* v. *Atlantic & North Carolina R. R.* (N. C. 1914) 81 S. E. 348, in which the plaintiff's ancestor granted a right of way to a railroad company which covenanted to erect and maintain a flag station. The covenantor assigned to the defendant, and the court decreed that the latter should continue to maintain the flag station, provided the public interests were not injuriously affected.[28] It appears to be settled that a covenant will run with an incorporeal hereditament[29] as well as with tangible realty, and if the land may be said to be the medium creating privity of estate, there would seem to be no reason why an incorporeal hereditament should not serve equally well as such medium.

ENFORCEMENT OF FORFEITURE CONDITIONS IN LEASES FOR YEARS.—When a lease for years contains a proviso that the lease shall become void on non-payment of rent or on default in the performance of any of the lessee's covenants, the enforcement of such a stipulation is gov-

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[23]See Aiken *v.* Albany etc. Ry. (N. Y. 1851) 26 Barb. 289; Allen *v.* Culver (N. Y. 1846) 3 Den. 284. Since the running of a benefit may be explained as the implied assignment of a chose in action, it does not appear necessary that any estate pass in order to create privity. See Shaber *v.* St. Paul Co., *supra.*

[24]See Keppel *v.* Bailey, *supra;* National Union Bank at Dover *v.* Segur, *supra,* p. 184.

[25]See Sexauer *v.* Wilson (1907) 136 Ia. 357.

[26]Fitch *v.* Johnson (1882) 104 Ill. 111; Norfleet *v.* Cromwell, *supra;* Bronson *v.* Coffin, *supra.*

[27]Midland Ry. *v.* Fisher (1890) 125 Ind. 19; Horn *v.* Miller (1890) 136 Pa. 640.

[28]See 14 Columbia Law Rev. 612. A grant of a right of way to a railroad has been construed in North Carolina as conferring an easement only. See Raleigh etc R. R. *v.* Sturgeon (1897) 120 N. C. 225.

[29]Bally *v.* Wells, *supra;* Van Rensselaer *v.* Hays, *supra;* Sterling Hydraulic Co. *v.* Williams (1872) 66 Ill. 393.